

**Letter of Findings: 09-0562
Gross Retail Tax
For 2006, 2007, and 2008**

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ISSUES

I. Vending Machine Sales – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-2.5-5-20; IC § 2.5-5-20(c)(4); IC § 6-8.1-5-1(c); Sales Tax Information Bulletin (August 2008).

Taxpayer argues that its sales of bottled water and bottled fruit juice by means of vending machines are not subject to the Gross Retail Tax.

II. Cafeteria Sales – Gross Retail Tax.

Authority: IC § 6-2.5-5-20; IC § 6-8.1-5-1(c); Sales Tax Information Bulletin (August 2008).

Taxpayer disagrees with the Department of Revenue's conclusion that it was required to collect Gross Retail Tax on the sale of food items to its cafeteria customers.

STATEMENT OF FACTS

Taxpayer is primarily in the business of operating and servicing vending machines located in Indiana. Taxpayer also makes wholesale food sales and operates cafeterias in select business locations.

The Indiana Department of Revenue (Department) conducted an audit review of taxpayer's business records and tax returns concluding that taxpayer's "sales tax returns revealed additional taxable sales which [had] not been reported...."

Taxpayer disagreed with the additional sales and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer's representative explained the basis for its protest. This Letter of Findings results.

I. Vending Machine Sales – Gross Retail Tax.

DISCUSSION

The Department assessed additional Gross Retail (sales) Tax on the ground that Taxpayer should have collected that amount of tax from its vending machine customers. Taxpayer disagrees pointing to a "Sales Tax Clarification" issued by the Department January 2004. Taxpayer points to Part VII of that document which states that, "There are several items that were previously taxed that are no longer taxable items. Ice and bottled water are no longer taxable." Taxpayer states that it conducted its business activity in reliance on that statement and the Department making a "retroactive imposition of tax, penalty and interest."

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

A. Bottled Water.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

Specifically, IC § 6-2.5-2-1 provides as follows:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2(a) provides for the complementary use tax:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Nonetheless, the sale of food and food ingredients for human consumption is exempt from Indiana sales tax as explained in IC § 6-2.5-5-20. "Sales of food and food ingredients for human consumption are exempt from the state gross retail tax." However, the exemption does not include food items which are "sold through a vending machine." IC § 6-2.5-5-20(c)(4).

The distinction is repeated in the Department's Sales Tax Information Bulletin 29 (August 2008) which

explains that "Taxable Grocery Items" includes "vending machine sales." See also Sales Tax Information Bulletin 29 (July 2005).

Taxpayer is correct to the extent that the sale of bottled water is typically exempt from the tax; however, taxpayer operates in a specialized niche of gross retail sales. It sells bottled water by means of vending machines and the law is clear on the issue. The exemption on which taxpayer relies does not include food items which are "sold through a vending machine." IC § 6-2.5-5-20(c)(4).

Taxpayer argues that it relied to its detriment on the "Sales Tax Clarification" issued by the Department January 2004. However, that document clearly cautions that "[f]or more detail concerning the taxability of food items and a list of taxable and exempt items, see Sales Tax Information Bulletin [29] available through our website at: www.in.gov/dor/publications."

Taxpayer argues that requiring it to collect sales tax on the bottle water sales is unconstitutional because its competitors, such as convenience stores, are not required to do so. Taxpayer concludes that the Department's stance "would constitute a denial of due process by an administrative agency."

An administrative hearing is not the proper venue in which to raise questions of a constitutional dimension. However, it should be noted that as an operator of vending machines, its most comparable competitors are not convenience stores or supermarkets but other vending machine companies. In addition, the decision to impose sales tax on vending machine sales is not the Department's decision but is a provision mandated by the Indiana General Assembly.

B. Fruit Juice.

Taxpayer argues that it was not required to collect sales tax on the sale of bottled fruit juice by means of its vending machines. Taxpayer states that it relied on the January 2004 "Sales Tax Clarification" which states that, "A beverage that contains more than fifty percent (50 [percent]) vegetable or fruit juice by volume is exempt."

As noted above, IC § 6-2.5-5-20 provides that, "Sales of food and food ingredients for human consumption are exempt from the state gross retail tax." However, the sale of bottled fruit juice – whether or not it contains more than "fifty percent (50 [percent]) vegetable or fruit juice by volume..." – is subject to sales tax if sold by means of a vending machine.

FINDING

Taxpayer's protest is respectfully denied.

II. Cafeteria Sales – Gross Retail Tax.

Taxpayer operates cafeteria services at two different third-party locations. Taxpayer does not "own" the cafeteria but simply prepares and sells the food. At those cafeteria locations, food is sold to individuals including "sandwiches, drinks, and other food items...." The Department's audit concluded that all cafeteria sales were subject to sales tax.

Taxpayer disagreed and argues that the various utensils and non-food items supplied at the cafeteria locations are provided by the third-party. Taxpayer concludes that because it simply provides food, those sales are not subject to sales tax.

IC § 6-2.5-5-20 provides as follows:

Sales of food and food ingredients for human consumption are exempt from the state gross retail tax. (b) For purposes of this section, the term "food and food ingredients for human consumption" includes the following items if sold without eating utensils provided by the seller: 1) Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries).

(2) Food sold in an unheated state by weight or volume as a single item.

(3) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.

(c) Except as otherwise provided by subsection (b), for purposes of this section, the term "food and food ingredients for human consumption" does not include:

(1) candy;

(2) alcoholic beverages;

(3) soft drinks;

(4) food sold through a vending machine;

(5) food sold in a heated state or heated by the seller;

(6) two (2) or more food ingredients mixed or combined by the seller for sale as a single item (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses);

(7) food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food); or

(8) tobacco. (Emphasis added).

Essentially taxpayer explains that because it does not provide the "eating utensils," its sales of food to the

cafeteria sales are exempt from sales tax as "food and food ingredients for human consumption."

Sales Tax Information Bulletin 29 (August 2008) explains:

Food sold in a heated state or heated by the seller is taxable. Two or more food ingredients mixed or combined by the seller for sale as a single item are taxable (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer so as to prevent food borne illness). Food that is sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws is taxable. (Emphasis added).

Taxpayer explains that it provides heated food to the cafeteria customers. Under IC § 6-2.5-5-20(c)(3), food which is heated and served to the customers is plainly subject to sales tax. The issue remains as to whether unheated food items are subject to sales tax if a third-party furnishes the eating utensils. Taxpayer explains that there are three parties involved in each transaction, the cafeteria customer, the third-party cafeteria owner, and itself. According to taxpayer, because the third-party cafeteria owner supplies the utensils, it was not required to collect sales tax.

Fortunately, it is not necessary to directly address the question. Taxpayer has provided no evidence establishing that the third-party cafeteria owner supplied the various "plates, knives, forks, spoons, glasses, cups, napkins, or straws...." Absent any such evidence, it is sufficient to determine that taxpayer failed to meet its burden under IC § 6-8.1-5-1(c) "of proving that the proposed assessment is wrong...."

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer should have collected sales tax on the sale of bottled water and fruit juice by means of its vending machines. Taxpayer has failed to demonstrate that it was not required to collect sales tax on its cafeteria sales. In all respects, taxpayer's protest is denied.

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